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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1962

## No. 490

JOHN L. BRADY,

*Petitioner,*

v.

WARDEN, MARYLAND PENITENTIARY,

*Respondent.*

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND AND TO THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY OF THE STATE OF MARYLAND

## BRIEF OF RESPONDENT

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# INDEX

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| OPINION BELOW | 1 |
| JURISDICTION | 1 |
| QUESTION PRESENTED | 2 |
| CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF PRACTICE AND PROCEDURE INVOLVED | 2 |
| STATEMENT OF THE CASE | 2 |
| ARGUMENT: | |
| I. The judgment of the Court of Appeals of Maryland remanding the case for a new trial on the question of punishment only did not deprive Petitioner of the equal protection of the laws | 2 |
| II. Under the facts of this case, the denial of due process of law does not require that Petitioner's conviction be reversed | 7 |
| CONCLUSION | 11 |


## TABLE OF CITATIONS

*Cases*


| | |
|---|---|
| United States ex rel. *Almeida* v. Baldi, 195 F. 2d 815; cert. den. 345 U.S. 904; reh. den. 345 U.S. 946 | 9, 10 |
| Blackburn v. Alabama, 361 U.S. 199 | 8 |
| Brady v. State, 226 Md. 422, 174 A. 2d 167 | 1 |
| Culombe v. Connecticut, 367 U.S. 568 | 8 |
| Day v. State, 196 Md. 384, 76 A. 2d 729 | 6 |
| Franklin v. State, 12 Md. 236 | 5 |
| Giles v. State, 229 Md. 370, 183 A. 2d 359 | 5 |
| Morey v. Doud, 354 U.S. 457 | 6 |
| Napue v. Illinois, 360 U.S. 264 | 8 |

| | PAGE |
|---|---|
| Payne v. Arkansas, 356 U.S. 560 | 8 |
| Rogers v. Richmond, 365 U.S. 534 | 8 |
| Slansky v. State, 192 Md. 94, 63 A. 2d 599 | 3 |
| Townsend v. Burke, 334 U.S. 736 | 8 |
| Vogel v. State, 163 Md. 267, 162 A. 705 | 5 |
| Wheeler v. State, 42 Md. 563 | 5 |


*Statutes*


| | |
|---|---|
| Annotated Code of Maryland: | |
| *1957 Ed.*— | |
| Article 27: | |
| Section 410 | 4 |
| Section 413 | 4 |
| *1961 Supp.*— | |
| Article 27: | |
| Section 645G (Repealed) | 7 |
| Constitution of Maryland: | |
| Article XV— | |
| Section 5 | 3, 5 |
| Constitution of the United States: | |
| Fourteenth Amendment | 5 |
| 28 U.S.C., Sec. 1257(3) | 1 |

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## BRIEF OF RESPONDENT

### OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported in 226 Md. 422 and in 174 A. 2d 167, and is included in the Transcript of Record (R. 46-52).

### JURISDICTION

The opinion of the Court of Appeals of Maryland was filed on October 11, 1961 and the mandate of that Court was filed on November 10, 1961 (R. 53-54). The time within which to petition for certiorari was extended until April 9, 1962 by order of Mr. Justice Stewart dated February 9, 1962 (R. 55). The petition was filed April 7, 1962 and was granted October 8, 1962. The jurisdiction of this Court is under 28 U.S.C. § 1257(3).

## QUESTION PRESENTED

Did the restriction of Petitioner's new trial to the question of punishment only deny Petitioner's constitutional rights?

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES OF PRACTICE AND PROCEDURE INVOLVED

The State of Maryland agrees that the constitutional provisions, statutes and rules of practice and procedure involved in this case are as set forth in Petitioner's brief.

## STATEMENT OF THE CASE

The State of Maryland adopts Petitioner's Statement of the Case, with the following modifications:

1. Petitioner's averment that the Court of Appeals held that suppression of evidence by the State denied due process of law to him is inaccurate; that Court held merely that the evidence had been withheld, not suppressed, by the State (R. 51).

2. Petitioner's admission in court of his participation in the robbery of William Brooks during the course of which a homicide was committed constituted a judicial confession of first degree murder.

## ARGUMENT

### I.

**The Judgment of the Court of Appeals of Maryland Remanding the Case for A New Trial on the Question of Punishment Only Did Not Deprive Petitioner of the Equal Protection of the Laws.**

Petitioner contends that the judgment of the Court of Appeals of Maryland deprives him of equal protection of

the laws because, unlike all other defendants, he is denied a trial of guilt with the withheld evidence available to him before a jury with the right to find him guilty of a crime less than first degree murder, or even acquit him. The thrust of this argument is two-fold: first, that despite the evidence and the law, a jury would have the right to acquit him or find him guilty of a lesser offense; and second, that in restricting the scope of his new trial to the question of punishment only, the judgment unconstitutionally discriminates against him.

It is true that the Constitution of the State of Maryland makes the jury in a criminal case judges of the law as well as of fact. Article XV, Section 5, Constitution of Maryland (Petitioner's Appendix, p. 15). If the jury's view of the law leads them to an acquittal, their verdict cannot be reviewed or set aside. *Slansky v. State*, 192 Md. 94, 63 A. 2d 599. In a sense the jury, it may be said, has the right to do wrong. But this does not mean that the jury has the right to do wrong deliberately, to act in bad faith or to ignore the law and render a verdict purely on the basis of whim. And the evidence in this case is so conclusive that no jury acting in good faith could fail to find Petitioner guilty of first degree murder.

In three extra-judicial statements given to the police on July 1, 1958, July 3, 1958, and July 9, 1958, Petitioner admitted his participation in the planned robbery of his acquaintance, William Brooks, during the course of which Brooks was choked to death (R. 4, 5 and 6). When Petitioner took the witness stand at his trial, he again admitted his participation in the robbery (R. 47; Petitioner's brief, p. 4). He has never retracted or repudiated this testimony at his trial, which amounted to a judicial confession of first degree murder under the Maryland criminal

statute, Article 27, Section 410, Annotated Code of Maryland (1957 Edition) — (Petitioner's Appendix, p. 15).

At the hearing on his petition for relief under the Maryland Post Conviction Procedure Act in the Circuit Court for Anne Arundel County it was conceded that Petitioner was guilty of murder in the first degree (R. 3). On his appeal to the Court of Appeals of Maryland from the denial of relief, Petitioner again conceded that at his trial he had admitted participation in the robbery in the course of which the homicide occurred (R. 47). This concession is also made in his brief in this Court.

The statement of Charles Boblit dated July 9, 1958, the withholding of which by the prosecutor the Court of Appeals held had deprived Petitioner of a constitutional right, in no way exculpated Petitioner from guilt of first degree murder. This statement makes it clear that it was Petitioner's idea to rob Brooks (Boblit did not even know the man) and that it was Petitioner's idea to strangle him (R. 41). From Petitioner's viewpoint the only favorable statement contained in this confession is the admission that Boblit actually performed the fatal act of strangulation (R. 40). But the question of which one of the two participants in the robbery killed the victim is relevant only to the question of punishment; that is, should the jury bring in a verdict of guilt of first degree murder without capital punishment? See Article 27, Section 413, Annotated Code of Maryland (1957 Edition) — (Petitioner's Appendix, pp. 15-16). It has no relationship whatsoever to the general question of guilt, and no jury acting in good faith could render any verdict except guilty even after considering this statement.

It is well settled in Maryland that there are limitations upon the constitutional provision that the jury shall be

the judges of the law as well as of fact in criminal cases. As early as 1858 it was held that the jury had no right to pass upon the constitutionality of a statute and that it was proper for the trial court to prohibit counsel from arguing that question before the jury. *Franklin v. State*, 12 Md. 236. Trial courts have always passed and still pass upon the admissibility of evidence the jury may consider on the issue of the guilt or innocence of the accused. *Vogel v. State*, 163 Md. 267, 162 A. 705; *Wheeler v. State*, 42 Md. 563. And see *Giles v. State*, 229 Md. 370, 183 A. 2d 359.

A further limitation is implicit in the opinion of the Court of Appeals below and in the very nature of an orderly judicial system: the jury has no right deliberately to flout the law. In spite of the jury's undoubted *power* to do so, it has no *right* to ignore the statutes and rules of court in reaching its verdict. Any contrary result would lead ultimately to chaos. Hence, it cannot be said that a jury would have the right to disregard Petitioner's confessions and ignore the felony murder statute and to find Petitioner not guilty of first degree murder.[1]

Assuming, *arguendo*, that Petitioner is correct in his interpretation of Article XV, Section 5, of the Constitution of Maryland, it does not follow that he was necessarily denied equal protection of the laws. Petitioner argues that the action of the Court of Appeals in limiting his new trial to the question of punishment only is a discriminatory restriction upon the right of an accused to a fair trial according to the procedure prevailing in ordinary cases. But the Fourteenth Amendment to the United States

[1] It follows that the trial judge's advisory instructions, which permitted the jury at Petitioner's trial to find five possible verdicts (R. 44-45), were erroneous. They were the standard instructions used in first degree murder cases in Maryland, but they simply were not appropriate for this case.

Constitution does not forbid all discriminations in the treatment of criminal offenders; the prohibition of the equal protection clause goes no further than invidious discrimination. *Morey v. Doud*, 354 U.S. 457. Whether Petitioner is the victim of invidious discrimination can be determined only by reference to the peculiar facts of this case.

The multiple confessions by Petitioner and the very limited scope of the statement withheld by the prosecutor have previously been discussed herein. There is a third aspect of this case which demands attention. As far as the Court of Appeals of Maryland is concerned, this case is unique. Never before has that court been presented with an appeal from a denial of relief under the Maryland Post Conviction Procedure Act where (1) a conviction of first degree murder, based on a homicide committed in the perpetration of a felony, had previously been affirmed, and (2) the alleged constitutional infirmity in the trial related solely to the question of punishment. Consequently, this is not an "ordinary case", and the fact that Petitioner was not granted the same relief given in "ordinary cases" does not require the conclusion that he was the victim of invidious discrimination. In the light of the totality of the facts in this case, there was a reasonable basis for the Court of Appeals to create a new and valid classification embracing all persons whose cases reach that Court in the same posture as that of Petitioner.

*Day v. State*, 196 Md. 384, 76 A. 2d 729, relied upon by Petitioner, does not support his contention that he has been unreasonably discriminated against. In that case, two defendants convicted of felony murder each admitted participation in a robbery but accused the other of the homicide. On appeal from the trial court's denial of a severance,

the Court of Appeals reversed the judgments and remanded the cases for new and separate full trials. That case, it should be noted, came up on direct appeal from the convictions.

The instant case, on the other hand, reached the Court of Appeals following the denial of Post Conviction relief after the conviction itself had been affirmed. The Maryland Post Conviction Procedure Act bestowed broad power and discretion upon the courts as to the type of relief which could be granted. If the court should find in favor of a petitioner, the Act provided that the court should enter "an appropriate order with respect to the judgment or sentence in the former proceedings, and any supplementary orders as to rearraignment, retrial, custody, bail, discharge, correction of sentence, or other matters that may be necessary and proper". Article 27, Section 645G, Annotated Code of Maryland (1961 Supp. — now repealed) — (Petitioner's Appendix, p. 16). In this case, therefore, the court was not required merely to affirm or reverse the conviction of Petitioner, but was able to grant relief which, it is submitted, was singularly "appropriate" *for one whose sole claim of prejudice went to the punishment imposed.*

## II.

## Under the Facts of this Case, the Denial of Due Process of Law Does Not Require that Petitioner's Conviction Be Reversed.

Petitioner argues that the withholding of Boblit's statement, which constituted a denial of due process of law, vitiated the entire proceeding, and hence the verdict of guilt cannot stand. The validity of this contention must be examined in the light of the facts of this case, particularly the fact that the sole thrust of his defense was

that not he but his companion was the actual murderer (Petitioner's brief, p. 12; R. 27). That defense was not calculated to bring about an acquittal, but merely to influence the jury to add the words "without capital punishment" to a verdict of guilt of first degree murder. The withheld statement was pertinent to this defense, but also was convincing proof of guilt of first degree murder. Petitioner made, in effect, a judicial confession of first degree murder. It cannot be assumed that the jury would act in derogation of its duty and fail to render such a verdict.

How, then, was Petitioner harmed by the denial of due process of law? Only by being deprived of an opportunity to present to the jury additional evidence which might persuade them to spare him the death penalty. To the extent that his trial was unfair the unfairness was related solely to the question of punishment, and that unfairness has been rectified by the judgment of the Court of Appeals. Consequently, since the denial of due process of law did not taint the entire proceeding, it does not require the reversal of the conviction.

*Blackburn v. Alabama*, 361 U.S. 199; *Napue v. Illinois*, 360 U.S. 264; *Rogers v. Richmond*, 365 U.S. 534; *Payne v. Arkansas*, 356 U.S. 560; and *Culombe v. Connecticut*, 367 U.S. 568, cited by Petitioner, involved the use of involuntary confessions or the knowing use by the prosecutor of perjured testimony. The tainted evidence in those cases had a direct bearing on the verdict and was not *solely* relevant, as in the instant case, to the question of punishment.

In *Townsend v. Burke*, 334 U.S. 736, the absence of counsel prejudiced the defendant when he was sentenced on the basis of assumptions concerning his criminal record

which were materially untrue. Although he had pleaded guilty to burglary and robbery, his convictions were reversed. But the question presented in the present case does not appear to have been raised in *Townsend*. It is respectfully submitted that the relief granted in that case exceeded what is required by the minimal standards of due process.

Petitioner also relies upon *United States ex. rel. Almeida v. Baldi*, 195 F. 2d 815, cert. denied 345 U.S. 904, reh. denied 345 U.S. 946. In that case the United States Court of Appeals for the Third Circuit found that the defendant had been denied due process of law by the state's suppression of evidence relevant only to the degree of punishment for murder in the first degree. The suppressed evidence might have persuaded the jury that the fatal bullet was not fired by the defendant, but by an accomplice in the robbery or by a law enforcement officer. The Court of Appeals affirmed the judgment of the District Court, which had issued a writ of habeas corpus. In order to properly appreciate the decision of the Court of Appeals, it is necessary to review the posture of the case when it reached that court. The suppressed evidence came to light at the trial of another defendant subsequent to Almeida's conviction. Some of this evidence was brought to the attention of the Court of Oyer and Terminer in proceedings for a new trial filed by Almeida. The new trial was denied. Almeida then appealed and also filed a petition for a new trial in the Supreme Court of Pennsylvania, which denied the petition and affirmed the judgment of conviction. After application for certiorari was made to this court and was denied, Almeida filed a petition for a writ of habeas corpus to the Supreme Court of Pennsylvania setting up in detail the evidence secured at the second defendant's trial. Al-

though the issue of intentional suppression of pertinent and vital evidence was explicitly raised by this petition, habeas corpus was denied by the Supreme Court of Pennsylvania in a per curiam opinion giving no reasons for the denial. Again, application for certiorari was denied.

It is clear therefore that although the issue of suppression of evidence was squarely presented to the Pennsylvania courts, those courts had refused to grant any relief. Such is not the case with the Petitioner. The Court of Appeals of Maryland has afforded him a retrial on the issue of punishment for first degree murder, which is the only issue to which the withheld statement was relevant. The District Court in the *Almeida* case had no authority to order a new trial in the state courts on the issue of punishment only, and the action of the Circuit Court of Appeals in affirming the decision of the District Court was entirely proper. It is submitted, however, that the procedural aspects of the *Almeida* case render it *inapposite* here.

## CONCLUSION

Petitioner is no longer under sentence of death. The Court of Appeals of Maryland has awarded him a new trial on the question of punishment only, which is the only area of his trial which was tainted by unfairness. In view of his judicial confession, the nature of the withheld statement, the limited scope of his defense and the procedural posture of the case in the court below, Petitioner was not denied his constitutional rights. The judgment of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

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